SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., Plaintiff, v. NATIONAL REVIEW, INC., et al., Defendants.	Case No. 2012 CA 008263 B Judge Alfred S. Irving, Jr.

Defendants Competitive Enterprise Institute and Rand Simberg's
Motion To Alter or Amend Judgment

Pursuant to D.C. Superior Court Rule 60(a), Defendants Competitive Enterprise Institute and Rand Simberg file this motion to reduce the June 22, 2020 discovery sanction award against Plaintiff Michael E. Mann to judgment in the Final Judgment Order. In support, Competitive Enterprise Institute and Mr. Simberg state as follows:

1. On June 22, 2020, the Court (Judge Anderson) granted Defendant Competitive Enterprise Institute and Rand Simberg's Motion for Payment of Expenses because Plaintiff failed to produce responsive documents and other information to Defendants' discovery requests. The Defendants were forced to file a motion to compel to obtain this discovery, which the Court granted. *See* May 5, 2020 Order (reproduced as Trial Exhibit 1042 and attached as Exhibit A). The Court noted that "Plaintiffs objection to the vast majority of the discovery was not warranted because Defendants' requests were directly related to what was in the Complaint." June 22, 2020 Order at 1 ("Order") (attached as Exhibit B). The Court also found it reasonable to award Defendants' fees and costs incurred in litigating the motion to compel in the amount of $9,588.64. Order at 2.

2. On February 9, 2024, this Court entered a Final Judgment Order in the amount $1,001 against Defendant Rand Simberg and did not include the sanctions award of $9,588.64 against Plaintiff from the Order by Judge Anderson. This omission should be corrected.

3. Pursuant to D.C. Superior Court Rule 60(a), the Court "may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." D.C. Super. Ct. R. 60(a). When a verdict is reduced to judgment and the judgment omits an earlier sanctions award, the proper remedy is amending the judgment pursuant to Rule 60(a). *See, e.g.*, *Cowan v. Youssef*, 687 A.2d 594, 598 (D.C. 1996) ("When the verdict was reduced to judgment a few days later, the court failed to incorporate into the judgment its earlier decision to impose a $6,000 sanction on Mr. Cowan for his discovery violations. The tenants filed a timely motion under Super. Ct. Civ. R. 60(a) to amend the judgment by correcting this omission.").

4. Defendants Competitive Enterprise Institute and Rand Simberg respectfully request that the Final Judgment Order be amended to reduce the discovery sanction against Plaintiff to judgment and include the following additional language: ORDERED that, pursuant to Rule 37(a)(5) of the Superior Court Rules of Civil Procedure, JUDGMENT IS ENTERED in favor of Defendant Competitive Enterprise Institute and Defendant Rand Simberg and against Plaintiff Michael E. Mann in the amount of $9,588.64 in accordance with the Order of this Court dated June 22, 2020.

Rule 12-I Certification

I hereby certify that counsel for Competitive Enterprise Institute and Rand Simberg contacted Plaintiff's counsel, counsel for Mr. Steyn, and counsel for National Review regarding this motion. Plaintiff's counsel did not respond. Mr. Steyn consents to this motion. National Review consents to this motion.

Dated: February 15, 2024

Respectfully submitted,

/s/ Andrew M. Grossman

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Certificate of Service

I hereby certify that on February 15, 2024, I caused a copy of the foregoing, and all accompanying papers, to be served by eFileDC upon the following:

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/s/ Andrew M. Grossman
Andrew M. Grossman

Declaration of Mark W. DeLaquil in Support of Defendants Competitive Enterprise Institute's and Rand Simberg's Motion to Alter or Amend the Judgment

Pursuant to Rule 43(3) of the Superior Court Rules of Civil Procedure, I, Mark W. DeLaquil, declare as follows:

1. I am counsel in this matter for Defendants Competitive Enterprise Institute and Rand Simberg. I submit this Declaration in support of Defendants Competitive Enterprise Institute's and Simberg's Motion to Alter or Amend the Judgment. I have personal knowledge of the facts stated herein.

2. Attached as Exhibit A is a true and correct copy of the Court's Order Granting Defendants Competitive Enterprise Institute's and Rand Simberg's Motion To Compel Discovery (May 5, 2020).

3. Attached as Exhibit B is a true and correct copy of the Court's Order Granting Defendants Competitive Enterprise Institute's and Rand Simberg's Motion for Payment of Expenses (June 22, 2020).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 15, 2024

/s/ Mark W. DeLaquil
Mark W. DeLaquil

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., Plaintiff, v. NATIONAL REVIEW, INC., et al., Defendants.	Case No. 2012 CA 008263 B Judge Alfred S. Irving, Jr.

(Proposed) Order

Upon Consideration of Defendants Competitive Enterprise Institute's and Rand Simberg's Motion to Alter or Amend the Judgment, the memoranda in support thereof, and any opposition thereto, it is hereby:

ORDERED that Defendants Competitive Enterprise Institute's and Rand Simberg's Motion to Alter or Amend the Judgment is GRANTED.

DATED this ____ day of _____, 2024.

_____
The Honorable Alfred S. Irving, Jr.
Associate Judge

Exhibit A

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, Ph.D.,	*	
Plaintiff,	*	
	*	**2012 CA 008263 B**
v.	*	**Judge Jennifer M. Anderson**
	*	**Civil I, Calendar 3**
NATIONAL REVIEW, INC., *et al*.,	*	**Status Hearing: June 22, 2020**
Defendants.	*	

ORDER GRANTING IN PART DEFENDANTS COMPETITIVE ENTERPRISE INSTITUTE'S AND RAND SIMBERG'S MOTION TO COMPEL DISCOVERY

The matter before the Court is Defendants Competitive Enterprise Institute's and Rand Simberg's Motion to Compel Discovery filed on February 21, 2020, and Plaintiff's Opposition filed on March 16, 2020.

Defendants request the Court to compel discovery (interrogatories and document production) from Plaintiff for information relating to his alleged injury and damages, and information relating to the causation of his alleged reputational injury and damages. In his Opposition, Plaintiff argues that Defendant's requested information is irrelevant because the article at issue is defamatory *per se*; once liability is established, he is entitled to presumed general damages; thus, he is not required to submit evidence of actual damages or compensatory damages[1] (Pl.'s Opp'n. at 9). Causation is also presumed, (*id.* at 13), which implies he is not required to submit evidence of causation either. The Court disagrees with Plaintiff.

Plaintiff alleged proximate cause, the amount of damages to be determined, and the nature and extent of the damages in his Amended Complaint, thereby placing them directly at issue. (*See*

[1] Actual damages and compensatory damages are interchangeable. *See Birdsall v. Coolidge*, 93 U.S. 64, 64 (1876) ("compensatory damages and actual damages mean the same thing"); *Amiri v. Government of the Dist. of Columbia*, 2000 U.S. Dist. LEXIS 7263, *3 (May 16, 2000) ("actual damages also termed compensatory damages …").

Amend. Compl. ¶ 56, 92, 110, "as the proximate result of Defendants' statements and publication, Plaintiff has suffered and continues to suffer damages in an amount to be determined at trial; the full nature, extent, and amount of these damages will be added at trial"). A defendant is entitled to the discovery that is directly based on or relevant to the complaint. *See United States v. All Assets Held at Bank Julius Baer & Co*., 309 F.R.D. 1, 15 (D.D.C. 2015) (concluding the government is entitled to the discovery that is based directly on the amended complaint); *see also Nuskey v. Lambright,* 251 F.R.D. 3, 11 (D.D.C. 2008) (permitting discovery to the extent it is relevant to the allegations in her complaint). The information relating to the damages and causation, as alleged in the Amended Complaint, is relevant and Defendants are entitled to receive it.

Despite claiming presumed general damages in his Opposition and using it as a basis to reject Defendants' discovery requests (*see* Defs.' Mot. Ex. 2 "given that the defamations, in this case, are *per se*, damages are presumed"), Plaintiff is*,* in fact*,* seeking compensatory damages that require proof. At the end of the Amended Complaint, Plaintiff "demands judgment against Defendants for compensatory damage in an amount to be proven at trial." (Amend. Compl. at 25.) In each paragraph that alleges damages, Plaintiff states "as a proximate result of the aforementioned statements, Dr. Mann has suffered and continues to suffer damages in an amount to be determined at trial" (Amend. Compl. ¶ 56, 92, 110), which is a clear call for compensatory damage because it includes causation and a determinable amount. Plaintiff must undertake the required burden of proof associated with compensatory damages and submit evidence which for Defendants are then entitled to challenge.

Recovering compensatory damage requires the plaintiff to prove the (1) existence of an actual injury, (2) causation traced back to the defendant's wrongdoing, and (3) the amount that is precisely commensurate with the injury suffered. *See Amiri v. Government of the Dist. of*

Columbia, 2000 U.S. Dist. LEXIS 7263, *3 (May 16, 2000) (compensatory damage is the amount awarded to the plaintiff to compensate for a proven actual injury or loss); *Birdsall v. Coolidge,* 93 U.S. 64, 64 (1876) (compensatory damages shall be the result of the injury alleged and proved, and that the amount awarded shall be precisely commensurate with the injury suffered, neither more nor less). None of these elements can be presumed without proof and counterproof. Plaintiff has the right to prove these elements to receive the compensatory damages he seeks, and his opponents equally have the right to challenge that proof.

The presumption of general damages in a libel *per se* case can only get a plaintiff so far as having an actionable case without pleading any special harm that is normally required in a tort case. *See Clawson v. St. Louis Post-Dispatch, LLC,* 906 A.2d 308, 312-313 (D.C. 2006) (concluding a plaintiff bringing a defamation action must show either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm). Whether an alleged libel is actionable is distinct from the issue of damages. Actionable means a defendant's conduct is the subject of legal action, and the harm is remediable by an action at law or equity; it does not get to how much damage award a plaintiff is entitled to receive.

It is worthy of note that in a defamation case, the general damages that can be presumed are limited to reputational injury because it is the reputational harm that is subtle, indirect, and impossible to trace. *See Dun & Bradstreet v. Greenmoss Builders,* 472 U.S. 749, 765 (1985) (White, J., concurring) (defining general damages as reputational injury and special injury as pecuniary loss and emotional distress). Even if the plaintiff is seeking general damages only (which is not the case here), the defendant still has the right to show there was, in fact, no reputational injury at all; if that is the case, the plaintiff is only entitled to nominal damages. *See id.* (concluding in the event of no reputational injury the prevailing rule was that nominal damages

were to be awarded for any defamatory publication actionable *per se* to serve a vindicatory function).

Furthermore, to obtain punitive damages as Plaintiff wishes here, Plaintiff must establish he has suffered compensable harm as a prerequisite to the recovery of additional punitive damages. *Linn v. United Plant Guard Workers of Am*., Local 114, 383 U.S. 53, 66 (1966); *see Intercity Maint. Co. v. Local 254, Serv. Employees Int'l Union AFL-CIO*, 241 F.3d 82, 90 (1st Cir. 2001) ("no punitive damages may be awarded absent evidence of actual damages."). Establishing compensable harm requires proving the elements set forth above.

Accordingly, the Court will allow the requested discovery with some limitations. Defendants seek to compare the "before and after" of Plaintiff's income and reputation by asking for information from 2005 to the present. Given that the article was published in July of 2012, it is reasonable to go back in time five years to 2007 to establish a base point for Plaintiff's income and reputation and to the present to determine the loss of income or reputation, if any, that resulted from its publication.

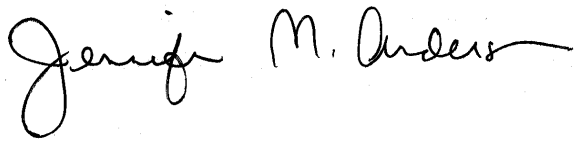
The Court notes that the document production requests in the second set are narrower than the first set; specifically, Defendants asks only for the documents relating to Plaintiff's professional activities and earnings. (Mot. at 4.) That seems to be a more reasonable starting point. Accordingly, it is this 5th day of May, 2020 hereby

ORDERED that Defendants Competitive Enterprise Institute's and Rand Simberg's Motion to Compel Discovery is **GRANTED IN PART;** it is further

ORDERED that discovery responses are limited to the period of 2007 to the present; it is further

ORDERED that Plaintiff produce all responsive documents to Requests 1-3, 7-8, and Requests 10-11 in CEI Defendants' Second Set of Requests for Production. It is further

ORDERED that Plaintiff provide the information requested in Interrogatories 2-4 in CEI Defendants' First Set of Interrogatories and Interrogatories 22-23, 25, 26, 29, and 31 in CEI Defendants' Second Set of Interrogatories.



Judge Jennifer M. Anderson
Signed in Chambers

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Exhibit B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, Ph.D.,	*	
Plaintiff,	*	
	*	**2012 CA 008263 B**
v.	*	**Judge Jennifer M. Anderson**
	*	**Civil I, Calendar 3**
NATIONAL REVIEW, INC., *et al.*,	*	**Status Hearing: June 22, 2020**
Defendants.	*	

ORDER GRANTING DEFENDANTS COMPETITIVE ENTERPRISE INSTITUTE'S AND RAND SIMBERG'S MOTION FOR PAYMENT OF EXPENSES

The matter before the Court is upon the consideration of Defendants Competitive Enterprise Institute ("CEI")'s and Rand Simberg's Motion for Payment of Expenses filed on May 15, 2020; Defendants' counsel's declaration of expenses in the amount of $12760.26 (attached to the Motion); and Plaintiff Michael Mann's Opposition filed on May 29, 2020.

Pursuant to Superior Court Civil Rule 37(a)(5), if a motion for order compelling discovery is "granted in part and denied in part, the court may … after giving an opportunity to be heard, apportion the reasonable expenses for the motion." In the Order issued on May 5, 2020, the Court granted the vast majority of Defendant's requests albeit shortening the requested 15- year discovery period by two years and excluding two document production requests out of a dozen. Plaintiff's objection to the vast majority of the discovery was not warranted because Defendants' requests were directly related to what was in the Complaint. Therefore, the Court finds it reasonable to award Defendants 75% of its attorneys' fees and all of its costs incurred in litigating the Motion to Compel Discovery. The Court further finds that the fees, as charged, are reasonable.

Accordingly, it is this 22nd day of June 2020 hereby

ORDERED that Defendants Competitive Enterprise Institute's and Rand Simberg's Motion for Payment of Expenses is **GRANTED**. It is further

ORDERED that Defendants are awarded the expenses in connection with the motion to compel discovery in the amount of 9588.64.

Judge Jennifer M. Anderson
Signed in Chambers

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